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APR 24 1970

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1476

MARGARET WRIGHT,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

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IN THE

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No. _____

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

Petitioner Margaret Wright prays that A Writ of Certiorari issue to review the decision and judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered on January 9, 1970, affirming the judgment of the Municipal

Court of the Los Angeles Judicial District, entered May 12, 1969, which found petitioner guilty under a trial without jury of violating §602.7 of the California Penal Code. [C.T. 9] 1/ The Appellate Department of the Superior Court of the State of California for the County of Los Angeles denied petitioner's petition for a rehearing by it or for certification to the California Court of Appeal, by an order entered January 28, 1970. [C.T. 10]

OPINIONS BELOW

The opinion of the Municipal Court is not reported; the Engrossed Statement on Appeal, settled by said Municipal Court, appears in full in the certified Record. [C.T. 12-18] The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is not reported; a copy thereof is attached hereto as Appendix "A".

JURISDICTION

The judgment of the Appellate Department of the Superior Court was entered January 9, 1970. [C.T. 54] The order of the Appellate

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1/ Meaning: Clerk's Transcript, page 9.

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Department of the Superior Court denying petitioner's petition for a rehearing or for certification of the cause to the California Court of Appeal, was entered January 28, 1970. [C.T. 10]

By its refusal to certify, the judgment of the Appellate Department became the judgment of the highest California court entitled to hear the case.

The constitutional issues here presented were urged in the trial court [E.S. 5/27-7/3], 2/ were considered by it and were overruled [id. 5/16-7/3]; they were urged before the Appellate Department of the Superior Court by petitioner in her brief filed therein [C.T. 19-40, 41-49], and were considered by it and were again overruled. [C.T. 54-59]

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) and §2101(d), and Rule 22(1) of the Rules of this Court.

2/ Meaning: Engrossed Statement on Appeal, page 5, line 27 to page 7, line 3.

QUESTIONS PRESENTED

I. DID THE COURT BELOW, IN HOLDING PETITIONER CRIMINALLY PUNISHABLE BY FORCE ONLY OF A RETROACTIVE JUDICIAL EXPANSION OF A STATUTE INAPPLICABLE BY ITS TERMS TO PETITIONER'S CONDUCT, DISREGARD THE UNITED STATES SUPREME COURT'S PLAIN MANDATE IN BOUIE v. COLUMBIA, 378 U.S. 347, AND THEREBY DENY PETITIONER BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW, AND FREEDOM OF PETITION, SPEECH AND ASSEMBLY, ALL CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION?

II. WAS THE CLAIMED ADMONITION TO THE ASSEMBLAGE NOT TO ENTER THE ADMINISTRATION BUILDING SO FATALLY AMBIGUOUS THAT NO CONVICTION CAN BE GROUNDED THEREON CONSISTENT WITH THE REQUIREMENTS OF DUE PROCESS AND OF LIBERTY OF SPEECH, PETITION, ASSEMBLY AND ASSOCIATION UNDER THE FIRST AND FOURTEENTH AMENDMENTS?

III. WILL DUE PROCESS AND THE FIRST AMENDMENT SECURITIES PERMIT THE CONVICTION BELOW TO STAND INASMUCH AS IT RESTS, IN ONE COEQUAL ALTERNATIVE, UPON A FINDING ONLY THAT PETITIONER "AT LEAST ... SHOULD HAVE HEARD" DR. WALLACE'S COMMAND?

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STATUTORY PROVISIONS INVOLVED

California Penal Code §602(j), provides in material part that:

> "Every person who wilfully commits any trespass by either: * * * (j) Entering any lands . . . with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on [thereon] [shall be guilty of a misdemeanor]."

The full text of said statute is attached hereto as Appendix "B-1".

California Penal Code §602.7, in material part and as the same appeared at all times herein material, provided: "In any case in which a person who is not a student or officer or employee of a state college or state university, and who . . . enters [any] campus or facility [of any such college or university]" and who "fails" "to leave such campus or facility" upon being "direct[ed] . . . to leave such campus or facility" by a proper administrative official reasonably believing that such person is interfering with the peaceful conduct of the activities of such campus or facility, or has entered thereon for the purpose of committing such an act [he shall be guilty of a misdemeanor]." The full text of said statute is appended hereto as Appendix "B-2".

STATEMENT OF THE CASE

On January 13, 1969, petitioner Margaret Wright, because of conduct occurring on the campus of the San Fernando Valley State College on January 8, 1969, was charged with violating the two California misdemeanor "trespass" statutes identified above, Penal Code §§ 602(j) and 602.7.

In essence §602(j), as excerpted above, punishes "entering" any lands " with the intention of interfering with [or] obstructing" any lawful business carried on there. Separately and distinguishably, §602.7 punishes any "fail[ure]" by any nonemployee, nonstudent "to leave" "any campus or other facility" of any California state college or university upon being reasonably "direct[ed] . . . to leave" the same by an authorized administrative official reasonably believing the person's conduct to be interfering with the peaceful activities thereof, or reasonably believing the person has entered such campus or facility for the purpose of so interfering [Emphasis added].

Petitioner was tried without a jury. She was acquitted under Count One of the "entering" charge under §602(j), and was convicted under Count Two of the "fail[ure] * * * to leave" charge under §602.7.

The facts, as found in detail and set forth by the trial court in the "Engrossed Statement on Appeal," appearing in the certified Record

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[C.T. 12-19] are briefly these:

On January 8, 1969, petitioner Margaret Wright came to the campus of the San Fernando Valley State College, a California State college located within the Los Angeles Judicial District of the State of California, at or about 1:00 P.M. The college was open and, except for the events described below, a normal school day was in progress. Mrs. Wright was neither a student, officer, nor employee of the college. She is a black woman and a mother of school-age children and she had come to the campus at the invitation of the Valley State College chapter of the Black Student Union (hereinafter referred to as the "BSU") to speak at a rally in an area on the campus grounds that had been set aside by the college as a "free speech" area.

Prior to her arrival (at 1:00 P.M.), the rally had been in progress for some time and various speakers had spoken regarding the problems, grievances, and demands of black students at the college.

Upon her arrival at the free speech area, Mrs. Wright addressed the crowd, speaking on the necessity and desirability of what she referred to as "black education". At this time there were approximately 300 to 400 persons attending the rally. On the podium with her when she was speaking were various members of the BSU and the Reverend James Hargett, an individual active in black community affairs generally and in black student affairs at the college specifically.

After she completed her talk to the group, Mrs. Wright and Reverend Hargett were invited by various members of the BSU to accompany them to the school's Administration Building to discuss their grievances with Dr. Delmar Oviatt, the then acting Dean of the college. Mrs. Wright testified that when she was so invited she did not know whether those who had asked her to accompany them to the Administration Building had an appointment to see Dr. Oviatt. She personally had no appointment to see Dr. Oviatt.

Thereafter, and at approximately 1:30 P.M., Mrs. Wright and Reverend Hargett, and various members of the BSU, proceeded four or so abreast to the front of the Administration Building and were followed by the crowd of approximately 300 to 400 individuals. Mrs. Wright was one of the persons in the front row of this procession to the Administration Building.

The march from the "free speech" area to the Administration Building was peaceful; no attempts were made to stop or deter the crowd or petitioner from proceeding to the Administration Building. No one requested that petitioner or anyone else leave the campus.

The crowd, including petitioner, arrived at the West entrance of the Administration Building at approximately 1:45 P.M. Upon its arrival at the building, the crowd, which by then had grown in size to over 500 persons, formed a semi-circle around the West entrance

area of the Administration Building, and for approximately 15 minutes thereafter, various individuals, including petitioner, spoke to the assembled crowd by means of an amplification system, more commonly known as a "bullhorn". During this period, the crowd would intermittently chant "We want Oviatt. We want amnesty." In addition, there was a great deal of general crowd noise in the area. There was evidence that at the time the crowd gathered in front of the Administration Building the building was still in operation and except for the Cashier's area, business was being conducted therein as usual.

Dr. Earl Wallace, the then acting Dean of Students, and the officer of the college who had been designated to maintain order on the campus, feared that the crowd would attempt to enter the Administration Building and carry on in such a manner therein as to disrupt the business being carried on therein.

At approximately 2:00 P.M., after having individually warned Reverend Hargett "that demonstrations would not be tolerated within the Administration Building", Dr. Wallace took a position in front of the West entrance of the Administration Building and, with the aid of the bullhorn, advised the entire crowd that "demonstrations would not be permitted inside the building, that those entering the building would be subject to arrest and campus discipline." Dr. Wallace testified that over the space of a few minutes he made the announcement to the crowd several times in a loud voice.

Several witnesses for the prosecution testified that they were in the crowd, one witness claiming to be as near as five feet from petitioner, and that they were able to hear and understand Dr. Wallace's announcement. Petitioner testified that she did not hear Dr. Wallace's announcement, and several defense witnesses who had been in the crowd in front of the building testified that they did not hear any such announcement.

At about 2:20 P.M., Reverend Hargett addressed the crowd, including petitioner, by means of the aforesaid bullhorn, and advised them that they were going to peacefully enter the Administration Building.

Thereupon various members of the crowd began to form in a line to enter the building. A prosecution witness stated he saw Reverend Hargett, first in line, come through the door, followed almost immediately by petitioner, that they entered "like marbles tumbling out of a bag". Petitioner testified that she walked peaceably into the building. No one advised her not to enter as she was in the process of walking into the building. No one advised her to leave the Administration Building once she had made entry. Once inside the building, neither petitioner nor any of the other persons who had entered with her engaged in any type of demonstration. Rather, shortly after she had entered the building and was merely standing in the corridor, she was placed under arrest by members of the Los Angeles Police Department who had been stationed within the

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building. Based upon her entry into the building she was subsequently charged with violating Penal Code §§ 602(j) and 602.7.

The trial court acquitted petitioner under Count One of the charge under §602(j) of "entering" property "with the intention of interfering with [or] obstructing" lawful activity thereon, but convicted her in anomalous manner under Count Two of the charge under §602.7 of "fail-[ing]" "to leave" a "campus or . . . facility" of a State College upon being reasonably "direct[ed] to leave."

Opposing conviction under Count Two for failure to leave as charged and prosecuted under §602.7, petitioner urged to the trial court the following three fundamental contentions:

> (1) That there was "absolutely no evidence" [E. S. 6/1] that petitioner was ever requested or directed to leave the Administration Building premises, as distinguished from being admonished not to enter thereupon; and that since petitioner was acquitted of the direct charge under §602(j) of engaging in a prohibited entry, and since §602.7 punishes only a failure to leave, there was no fair evidence of any violation of §602.7. To construe such statute retroactively to encompass a claimedly improper entry, despite the statute's lack of reference thereto, would violate petitioner's trial and due process rights

for failure to give fair warning of what conduct was made punishable and would violate Bouie and would offend freedom of speech, assembly and petition for failure to limit §602.7 to "the strict and narrow construction and application" required under the First Amendment. [E. S. 5/29-7/3, passim.]

(2) That in any event the evidence as to even a request or direction not to enter the premises of the Administration Building, as embodied in the warning of Dr. Wallace as described heretofore, was fatally ambiguous "in that it was not clear whether mere entry into the building or entry and demonstration would subject an individual to arrest." [E. S. 6/5-7.]

(3) That there was insufficient evidence, finally, that petitioner heard the admonition of Dr. Wallace in the noise and confusion of the events. [E. S. 4/11-14.]

The trial court overrode all of these points as urged by petitioner. The court found "that Mrs. Wright heard, or at least was in a position to hear and should have heard Dr. Wallace's admonition to the crowd regarding demonstrations and entry into the Administration Building." [E. S. 5/18-21.] [Emphasis added] The trial court ignored point (3). As to point (1), after "[h]aving determined [the] factual issue" "that Mrs. Wright heard, or at least was in a

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position to hear and should have heard Dr. Wallace's admonition", the trial court held "as a matter of law, that Mrs. Wright's entry into the building after Dr. Wallace's admonition to the crowd was equivalent to her having failed to leave a campus facility after having been directed to leave, i.e. the conduct specifically prohibited by Section 602.7 of the Penal Code." [E. S. 5/21-26, emphasis added]

The trial court conceded that "there was no evidence that defendant, once having entered the Administration Building, was directed to leave and thereupon failed and refused to do so", but the court rejected petitioner's plea that §602.7 be narrowly construed and ruled that §602.7 applied to petitioner's conduct because "it was within the spirit of the statute" "to prevent" an "entry" as well as a failure to leave, where "disruption could be prevented by barring [such] entry." [E. S. 6/27-28, emphasis added.]

The trial court thereupon adjudged petitioner guilty under Count Two for violation of §602.7.

On appeal to the Appellate Department of the Superior Court, petitioner as to point (1) above urged that upon the Record there was no evidence consistent with due process of law to support conviction under §602.7 because there was no evidence of a direction to leave, or of a failure to leave, as distinguished from a claimed prohibited entry. Petitioner urged that to construe the Section retroactively to

make punishable an entry as alternative to a failure to leave would violate her rights to both procedural and substantive due process and to freedom of speech, assembly and petition, contrary to the First and Fourteenth Amendments of the Federal Constitution, because, inter alia, denying her "fair warning" in advance "that her conduct would constitute a violation" of criminal law, and because such "unforeseeable and retroactive judicial expansion" of the "narrow and precise statutory language" of §602.7 would "directly" violate this Court's decision "of Bouie v. City of Columbia, 378 U.S. 347 (1964)". [A. B. 10-12 1/, Point I B; 12/14-15; 13/10-11; 14/1-5.]

Petitioner also urged to the Appellate Department points (2) and (3) above which she had urged before the trial court. [See A. B. 18/6-19/1, as concerns point (2); and 12/26-29, as concerns point (3).]

Respecting petitioner's key objection heretofore described that §602.7 could not reach petitioner's conduct because limited in terms to penalizing a failure to leave premises, after a direction to leave, whereas the evidence at best for the State dealt only with a claimedly improper act of entry, after a request or direction not to enter, the Appellate Department

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1/ Signifying Appellant's Brief ("Brief on Appeal for Appellant") to the Appellate Department of the Superior Court, pages 10-12.

divided two to one in sustaining petitioner's conviction under the Section. For the majority, Presiding Judge James G. Whyte observed:

> "The offense here is failure to leave after direction to do so. It may be conceded that a prior instruction not to enter is, in itself, not a direction to leave. . . . [However,] [h]ere Dr. Wallace's statement that the persons were not to enter was . . . accompanied by a warning of arrest upon entry. Surely there could be no more forceful way of telling one to leave than to advise him that his departure will be accomplished by his arrest and the consequent forcible removal of his person."

In contrast, dissenting Judge A. Curtis Smith, voted to reverse, observing, "The statute clearly requires as one element of the offense an authorized direction to leave and a failure to comply. I cannot equate a warning not to enter before entry with the statutory requirement of a direction to leave, presumably after entry."

In light of the Record and the Appellate Department's words quoted above, it is plain that such Court made the statute fit the conduct at bar only by force of a retroactive judicial "expansion" of the statutory terms. That a reasonable person, situated as was petitioner in advance of the events of January 8, 1969,

could reasonably read the statute, §602.7, to not cover any act merely of entry, whether warned against or not, is demonstrated not only by language and logic but by the avowed reading of the statute in such manner even after the fact by dissenting Judge A. Curtis Smith.

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW IN HOLDING PETITIONER CRIMINALLY PUNISHABLE BY FORCE ONLY OF A RETROACTIVE JUDICIAL EXPANSION OF A STATUTE INAPPLICABLE BY ITS TERMS TO PETITIONER'S CONDUCT, HAS DISREGARDED THIS COURT'S PLAIN MANDATE IN BOUIE v. COLUMBIA, 378 U.S. 347, AND HAS DENIED PETITIONER BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF LAW, AND FREESOM OF PETITION, SPEECH AND ASSEMBLY, ALL CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

As set forth in the Statement of the Case,

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the statute below by its terms makes punishable only a failure to leave a state college campus or facility after request to leave. It does not in terms apply to a claimedly prohibited entry following a request not to enter. Nonetheless petitioner was convicted below for conduct amounting at most to a claimedly prohibited entry. The California courts below have sanctioned such conviction, and have justified it, solely by force of an unforeseeable, retroactive judicial "construction" or "expansion" of the statute to reach petitioner's conduct despite the absence of coverage by the statute's terms.

This exact action by a state court (in factual premises so closely parallel to those at bar as to beggar any attempts at distinction) was held unconstitutional and void by this Court's decision in Bouie v. Columbia, 378 U.S. 347 (1964), because such action "violates the first essential[s] of due process" and "operates precisely like an ex post facto law". (Id., 351, 353.)

Bouie, in this Court's forceful and measured statement, involved a South Carolina statute by terms "appl[ying] only to 'entry upon the lands of another . . . after notice [not to enter]' " (id., 351-352, emphasis added), which "narrow and precise" statutory terms were "unforeseeably and retroactively expanded by judicial construction" (id., 352) to "also prohibi[t] the different act of remaining on the premises after being asked to leave." (Id., 356, emphasis added.) Consequently, said this Court the petitioners-defendants there were given

"[no] fair warning at the time of their conduct . . . that the act for which they [were] convicted was rendered criminal by the statute. * * * [P]etitioners were given not only no 'fair warning', but no warning whatever that their conduct [in refusing to leave] would violate the statute [which prohibited only improper entry]." (Id., 355, emphasis added.)

The Bouie judgment applies in its very terms to the case at bar. There is no basis for distinction. Nonetheless the California trial and appellate courts below disregarded and failed to observe the controlling, plain mandate of Bouie, and this without even explanation or discussion. The intervention of this Court, either by summary reversal, or by hearing and order upon certiorari, is required to vindicate the Federal supremacy of the Bouie decision, and to insure uniformity of law and rights within the premises of Bouie throughout the country.

Bouie has never been qualified or questioned, nor does it stand alone. It was followed in two concurrent cases at the time of its rendition [Barr v. Columbia, 378 U.S. 146, 151 (1964); Mitchell v. Charleston, 378 U.S. 551 (1964)] and it has been cited and approved in this Court's subsequent ruling in In Re Ruffalo, 398 U.S. 544, 551, f.n. 4 (1968). And the decision in Bouie was itself grounded upon the precedent of Pierce v. United States, 314 U.S. 306 (1941).

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Moreover, the Constitutional doctrine of Bouie condemning unforeseeable, retroactive judicial expansion of criminal statutes, is constructed from, and supported by, a whole host of due process and First Amendment Constitutional principles reaching back a half century and more. All of these Constitutional fundamentals serve separately and in combination to require the holding in Bouie, and all apply equally and identically as well to require invalidation of the conviction at bar.

(1) Procedural Due Process

"Unforeseeabl[e] and retroactiv[e] expan-[sion] by judicial construction" (Bouie, supra, at 352) of a criminal statute to reach conduct not reasonably embraced within its terms, deprives an accused of due process "in its primary sense", being "procedural due process of law" [Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673, 678 (1930) (emphasis added); Bouie, supra, at 354)] which requires indispensibly "notice" and "hearing" and a right to immunity from condemnation save by "a law which hears before it condemns." [Powell v. Alabama, 287 U.S. 45, 68 (1932)]. This requires, of necessity reasonable and meaningful advance notice of the charges laid, before hearing, and certainly before condemnation. [In Re Oliver, 333 U.S. 257, 273 (1947); Cole v. Arkansas, 333 U.S. 196, 201 (1947)]. Conviction without such notice is "[c]onviction upon a charge not made", and

such amounts in very statement to "sheer [and total] denial of due process." [De Jonge v. Oregon, 299 U.S. 353, 362 (1937); Gregory v. Chicago, 394 U.S. 111, 112 (1969); Garner v. Louisiana, 368 U.S. 157, 164 (1961)]. "The charge must be known before the proceedings commence [else] [t]hey become a trap" (In Re Ruffalo, supra, at 551, emphasis added) and no more fair as a means of punishment than for the State to prosecute a man under statute A and to punish him under statute B without ever previously suggesting the latter as the basis of an accusation. (Cole v. Arkansas, supra, at 201-202.)

The conviction below, being founded on after-the-fact judicial expansion of a criminal statute to reach conduct not foreseeably includable within its plain terms, offends thus the "first premises" of procedural due process, the rights to notice and to a hearing predicated thereon.

(2) Substantive Due Process And The Doctrine of "Void For Vagueness", And The Fundamental Requirement That Criminal Laws Must Give "Fair Warning" Of What Is Made Punishable.

For half a century this Court has resolutely enforced as a "first essential" of substantive due process [Lanzetta v. New Jersey, 306 U.S.

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451, 453 (1939)], mandated by "fundamental fairness" [Scull v. Virginia, 359 U.S. 344, 353 (1959); Johnson v. United States, 318 U.S. 189, 197 (1943)], the Constitutional doctrine of "void for vagueness", whereunder a state criminal statute may not be enforced unless upon its face it gives citizens "fair warning" of the conduct to be punished. [United States v. Cardiff, 344 U.S. 174, 176 (1952); Raley v. Ohio, 360 U.S. 423, 438-439 (1959)]. A criminal law which is so ambiguous, vague or unclear as to fail to reasonably apprise "those . . . subject to [its terms] what conduct on their part will render them liable to its penalties" is by that failure "void for vagueness". [Connally v. General Construction Co., 269 U.S. 385, 391 (1926); Lanzetta v. New Jersey, supra, at 453; Bouie v. Columbia, supra, at 351.]

The vice of vague criminal statutes is, in this Court's words, "the treachery they conceal" in misleading citizens as to what is truly intended to be punishable; if suffered to stand such laws can become "as much of a trap for the innocent as the ancient laws of Caligula." (United States v. Cardiff, supra, at 176.) But convictions had under criminal statutes retroactively "expanded" by judicial "construction" to reach conduct not reasonably within their terms, not merely parallel this "treachery", they compound it. In consequence such "judicial expansion" convictions must fail under the requirements of the "void for vagueness" doctrine, unless that ancient doctrine itself is to be set at naught. As this Court observed in Bouie, supra, at 352:

"When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."

(3) Absence of Legislative Standards Under Vague (Or Judicially Expandable) Statutes, and the Substitution Thereby Allowed Of Arbitrary Discretion and the Rule Of Men For the Constitutionally-Required Rule of Law.

The unconstitutionality of vague (or judicially expanded) criminal statutes derives not only from their "fail[ure] to give adequate guidance to those who would be law-abiding" [Musser v. Utah, 333 U.S. 95, 97 (1948)], but, equally important, from their failure to provide adequate, objective, controlling legislative standards to govern prosecutors, police, courts, and juries in administering and enforcing their

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terms, a failure which leaves such persons "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." [Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966); United States v. Cohen Grocery Co., 255 U.S. 81, 88-92 (1921); Small Co. v. American Sugar Refining Co., 267 U.S. 233, 240 (1924); Connally v. General Construction Co., supra, at 395; Musser v. Utah, supra, at 97; Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952)].

This not only violates the basic Constitutional principle prohibiting improper and arbitrary delegation of legislative powers, but it substitutes for even-handed, ascertainable law the ad hoc "law" of the administering and enforcing representatives of the government, which, in crucial terms, can often mean "government by the moment-to-moment opinions of a policeman on his beat." [Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965)]. Such is the antithesis of substantive due process, which takes it as a beginning premise that government in entirety under the American Constitution is, and can only be, "a government of laws and not of men." [Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886); Truax v. Corrigan, 257 U.S. 312, 332 (1921); Barbier v. Connolly, 113 U.S. 27, 31 (1885)].

(4) The Above Principles Have Particular Force in Areas Touching Or Involving Freedom of Speech, Press, Petition, Assembly Or Association.

Where exercises of First Amendment liberties are involved or affected, the Constitutional principles prohibiting vague criminal laws or accusations operate with special force. [Scull v. Virginia, supra, at 353; Smith v. California, 361 U.S. 147 (1959); Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961); Baggett v. Bullitt, 377 U.S. 360, 385 (1964); NAACP v. Button, 371 U.S. 415 (1963); Winters v. New York, 333 U.S. 507, 517 (1948)].

Within such areas such laws, which by definition and the inevitable consequence of their vagueness admit of arbitrary, discretionary and abusive enforcement, are condemned upon their face, and in category, by "decisions of this Court over the last 30 years"; this because to tolerate within the area of "First Amendment freedoms" criminal laws or regulatory procedures unconfined by "narrow, objective and definite standards" to scrupulously govern their enforcement is to suffer the creation of a wholly improper, intolerable and intimidating structure of governmental "censorship [and] prior restraint [over] the exercise . . . of free expression." [Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151 (1969); Staub v. Baxley, 355 U.S. 313, 322 (1958)].

Because of the "transcendent" interests of society attending free operation of the liberties of the people secured by the First Amendment---liberties upon which the democratic life of the nation depend [New York Times Co. v. Sullivan, 376 U.S. 254, 269-271 (1964); Stromberg v. California, 283 U.S. 359, 369 (1931); De Jonge v. Oregon, supra, at 365; Whitney v. California, 274 U.S. 357, 375-378 (1927) (concurring opinion of Brandeis, J.); Yick Wo v. Hopkins, supra, at 369-370)]---vague or ambiguous criminal or regulatory laws affecting such liberties are intolerable per se. The "mere existence of such [laws]" which "readily len[d] [themselves] to harsh and discriminatory enforcement by [petty] officials, against particular groups deemed to merit their displeasure" erects a "continuous and pervasive restraint on all freedom of discussion" and replaces freedom of speech with "the pernicious [evil] of censorship." [Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (emphasis added.)]

If vague penal or regulatory statutes within the areas of the First Amendment are thus categorically invalidated for failure to secure citizens against arbitrary censorship and abusive, discretionary and discriminatory enforcement, all the more plainly must convictions in such areas be condemned where supported only by after-the-fact judicial expansions of criminal statutes not applicable at all to a defendant's conduct in advance of such retroactive "construction". If arbitrary, discretionary punitive powers in the area of free speech are intolerable when exercised

and justified under vague laws, which at least afford some modicum of contention that the government's claim of authority has a valid base, then comparable arbitrary, discretionary punitive powers must be twice condemned where asserted under statutes which upon their face have no applicability in the circumstances concerned and which give the enforcing authorities no color of right. To sustain criminal punishment in such stated premises, supported only by after-the-fact judicial expansion of the statute to reach conduct not reasonably within its terms, extends the evils of censorship, prior restraint and intimidatory suppression of ideas to the ultimate.

(5) The Grievances and Subject Matter Of the Exercises Of Liberty Involved At Bar Particularly Require Vindication.

The purpose of the assembly by petitioner and others at the time and place of the charge laid against her below was to petition the governing administrative authorities of Valley State College on behalf of black students and the Los Angeles black community for a redress of grievances arising from invidious, unconstitutional discrimination based upon race with respect to rights, status, facilities, opportunities and educational experiences available to black people. That such grievances constitute a lawful occasion for assertion of the liberties

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of petition, assembly, association and speech, is not, and could not be, disputed by the State. That much at least is settled by Brown v. Board of Education, 347 U.S. 483 (1954).

But the Constitution makes much more self-evident as well. The State denials of rights forming the subject matter of petitioner's protest, and petition for redress, were themselves supremely illegal, and as unconstitutional in truth and in law as they were and are intolerable to passively endure. The right to immunity from discrimination grounded on race lies at the root of those personal dignities, securities and liberties which this Court has affirmed "depend on the outcome of no elections", and which by their "fundamental" nature lie beyond the lawful reach of others, no matter how assembled nor with what purpose or majority. In this Court's words:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles [entitled to summary vindication] by the courts. One's right to life, liberty and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

West Virginia v. Barnette, 319 U.S. 624, 638 (1943);

Citizens' Loan Association v. Topeka, 87 U.S. (20 Wall.) 655, 662-663 (1875).

A citizen subjected involuntarily to the denials of liberty affected at bar may not rightly be twice abused by the State by intimidatory criminal punishment, invoked and justified under a law not even applicable to her conduct until "expanded" after-the-fact by judicial "construction", simply for protesting against, and petitioning for redress of, the denials and mistreatments which she believed had been accorded black persons generally and Valley State College students specifically. If this Court cannot hear her voice, and vindicate her right to cry out, then, indeed, is the loss the nation's.

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II

THE CLAIMED ADMONITION TO THE ASSEMBLAGE NOT TO ENTER THE ADMINISTRATION BUILDING WAS FATALLY AMBIGUOUS, AND NO CONVICTION CAN BE GROUNDED THEREON EVEN AS TO PETITIONER'S ACT OF ENTRY, CONSISTENT WITH THE REQUIREMENTS OF DUE PROCESS AND OF LIBERTY OF SPEECH, PETITION, ASSEMBLY AND ASSOCIATION UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The testimony of Dr. Earl Wallace, acting Dean of Students, as found and quoted by the trial court, was that with the aid of a bullhorn he advised "the entire crowd" "several times in a loud voice" "that 'demonstrations would not be permitted inside the building, [and] that those entering the building would be subject to arrest and campus discipline.' " [E. S. 4/1-6.]

In both the trial court and Appellate Department, petitioner objected that even as to the subject of claimedly prohibited entry, such ammouncement by Dr. Wallace was fatally "ambiguous in that it was not clear whether mere entry into the building or entry and demonstration would subject an individual to arrest." [E. S. 6/5-7; A. B. 18/6-19/1.]

Petitioner urged "that a reasonable

interpretation of this ambiguous warning is that entry coupled with demonstration was the conduct which Dr. Wallace sought to prevent", and if "entry and subsequent demonstration" was the conduct Dr. Wallace intended to prohibit and prevent, then "appellant should not have been arrested or convicted for there was no demonstration." [A. B. 18/20-28.] If, however, Dr. Wallace "intended that either entry or demonstration would provide a [sufficient] basis for arrest and conviction", "as the trial court held [that he did]", then, urged petitioner, "the manner in which he indicated this to the assembled crowd was so ambiguous as to fail to give fair warning as required by the Due Process clause of the Fourteenth Amendment." [Id., 18/28-19/1.] Such ambiguity in a criminal command is violative per se both of substantive and procedural due process of law. [Raley v. Ohio, 360 U.S. 423, 438-439 (1959); United States v. Cardiff, 344 U.S. 174, 176 (1952); Garner v. Louisiana, 368 U.S. 157, 164 (1961); see also the cases cited under Point I (1) and (2), supra.)]

Particularly is this the case where freedom of speech, petition, assemblage or association are involved and where one alternative under the ambiguous State command would punish innocent and protected First Amendment speech or assemblage. [Stromberg v. California, 283 U.S. 359, 367-368 (1931); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); Ashton v. Kentucky, 384 U.S. 195, 199-200 (1966); Edwards v. South Carolina, 372 U.S. 229, 237-238 (1963); Henry v. City Rock Hill, 376 U.S.

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776, 778 (1964); Cox v. Louisiana, 379 U.S. 536, 551-552 (1965); Street v. New York, 394 U.S. 576 (1969); Gregory v. Chicago, 394 U.S. 111, 113 (1969)].

An ambiguous State command is even more offensive to liberty of speech and to criminal due process---both substantive and procedural ---than is a merely vague statute or command, because ambiguity has the special jeopardy of being latently entrapping, and of punishing after the fact what a citizen may have reasonably understood had been expressly declared to be permissible. [Cox v. Louisiana, 379 U.S. 536, 568-575 (1965); Raley v. Ohio, supra, at 438; Stevens v. Marks, 383 U.S. 234, 245 (1966); Scull v. Virginia, supra, at 353; Street v. New York, supra; Gregory v. Chicago, supra; United States v. Laub, 385 U.S. 475, 487 (1967)].

III

DUE PROCESS AND THE FIRST AMENDMENT SECURITIES WILL NOT PERMIT THE CONVICTION BELOW TO STAND BECAUSE IT RESTS, IN ONE COEQUAL ALTERNATIVE, UPON A FINDING ONLY THAT PETITIONER "AT LEAST . . . SHOULD HAVE HEARD" DR. WALLACE'S COMMAND.

The trial court did not find that petitioner "heard" the admonition above described by Dr. Wallace to the assembled crowd regarding demonstrations and entry into the Administration Building. Upon this crucial element of notice to petitioner of such prohibition or direction, the trial court found only "that Mrs. Wright heard, or at least was in a position to hear and should have heard Dr. Wallace's [said] admonition." [E. S. 5/18-21.] (emphasis added.)

This is a fatally defective finding. Under it petitioner's conviction may rest merely upon the non-penalizable circumstance that in all of the premises attending the assemblage of persons before the Administration Building on January 8, 1969, she "should have heard" Dr. Wallace's admonition. "Should have heard" does not mean heard. And without hearing, there could be on petitioner's part no knowledge or scienter, and without this petitioner's

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conduct could not be deemed punishable under the statute. Section 602.7 requires a "direct-[ion] . . . to leave" and a "fail[ure] [then] to do so", and a direction must be heard to make a failure to respond thereto a penalizable circumstance.

A defendant may be presumed "to know the law", but he may not be presumed to know the contents of a spoken admonition, direction or request, as involved at bar. If hearing were not required, there would be no rational object under the statute for requiring a "direction". In the premises here, an absence of a requirement and finding of scienter as a condition for conviction amounts to punishment without punishable quality in word or act, and offends due process [Robinson v. California, 370 U.S. 660, 666-667 (1962); Lambert v. California, 355 U.S. 225, 228-230 (1957); Aptheker v. Secretary of State, 378 U.S. 500, 509-514 (1964); Morrisette v. United States, 342 U.S. 246 (1952)], and violates specially and particularly the protections and securities of the First Amendment. [Smith v. California, 361 U.S. 147, 150-155 (1959); Elfbrandt v. Russell, 384 U.S. 11, 15-19 (1966); Noto v. United States, 367 U.S. 290, 299-300 (1961); Wieman v. Updegraff, 344 U.S. 183, 190-192 (1952); Watkins v. United States, 354 U.S. 178, 208-216 (1957)].

CONCLUSION

WHEREFORE, the Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles should be granted.

Respectfully submitted,

WILLIAM B. MURRISH and

MARSHALL L. BARTH

Attorneys for Petitioner

APPENDIX "A"

APPENDIX "A"

Filed Jan 9 1970
William G. Sharp,
County Clerk
By R. Von Gogh, Deputy

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,	) Superior Court No. CR. A. 8618
Plaintiff and Respondent,	)
vs.	) Trial Court No. 641107
MARGARET WRIGHT,	) MEMORAN-
Defendant and Appellant.	) DUM OPINION AND JUDG- MENT

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, Wilbur G. Dettmar, Judge.

Judgment affirmed.

For Appellant - Selvin and Cohen
by Marshall L. Barth

For Respondent - Roger Arnebergh, City Attorney
Madeleine Flier, Deputy City Attorney

-oOo-

Defendant was convicted of violating Penal Code §602.7 which makes it a misdemeanor for "a person who is not a student or officer or employee of a state college" who "is committing any act likely to interfere with the peaceful conduct of the activities" of a facility of such state college to fail to leave such facility after being properly directed to do so.

The constitutionality of Penal Code §602.7 has been established by People vs. Agnello [1968] 259 Cal. App. 2d 785 [66 Cal. Rptr. 571]. The question here involved is, was there sufficient evidence to support the trial court's finding that defendant violated it. In determining this question, we review the evidence as a whole and are not limited by the trial judge's declaration of his reasons for believing it sufficient. (People vs. Selz [1955] 138 Cal. App. 2d 205, 210 [291 P. 2d 186]; People vs. Evans [1967] 249 Cal. App. 2d 254, 257 [57 Cal. Rptr. 276].

The facility here involved was not the entire campus of San Fernando Valley State College. No one ever requested defendant to leave the campus or in any way sought to curtail her activities so long as she remained in the "free speech" area. Rather, the facility

involved in this case was the administration building and the question is, was defendant directed to leave that facility.

Preliminarily, three items should be quickly noted. The defendant is not one of the exempted persons and so falls within the prohibitions of the statute. Both Dr. Wallace, as the officer of the college who had been designated to maintain order on the campus, and security officer Norris as an employee designated to maintain order by Dr. Oviatt, the chief administrative officer of the college, were proper persons to direct the defendant to leave. Not only did it reasonably appear that the acts of the crowd, of which plaintiff was not only a part but an active leader, were reasonably likely to interfere with the peaceful conduct of the activities of the facility but they had already done so by causing the closing of the cashier's office immediately adjacent to the west entrance of the building (Settled Statement, p. 3, lines 7-8).

The offense here is failure to leave after direction to do so. It may be conceded that a prior instruction not to enter is, in itself, not a direction to leave. The question here is, was there evidence in this case to support the trial court's finding of a substantial compliance with the requirement of a direction to leave.

The section specifies no special ritual which must be performed by the warning authorities. All that is required is that the message is clearly conveyed so that a reasonable

person would definitely understand he was being told to leave the facility. Here Dr. Wallace's statement that the persons were not to enter was repeated practically contemporaneously with the actual entrance and was accompanied by a warning of arrest upon entry. Surely there could be no more forceful way of telling one to leave than to advise him that his department will be accomplished by his arrest and the consequent forceable removal of his person. But the evidence does not stop here. The doors and vestibule are part of the building (the facility which defendant was to leave). Dr. Hargett came through the door "followed almost immediately by the defendant." It was then that officer Norris, who was within arm's length of defendant, held out his arms to block those who were tumbling in "like marbles out of a bag" and warned against the already accomplished entry. Although Norris did not see the defendant as an individual and no one advised her as an individual not to enter, the trial court could, and apparently did, infer that she both saw and heard Norris attempt to restrain the crowd in general as they accomplished their entry. The law does not require the people to meet the burden of showing any direct evidence an actual instruction to leave given each individual arrested. Circumstantial evidence of the individual's receipt of such instruction is all that is necessary.

The judgment is affirmed.

Dated January 9, 1970

/s/ Whyte
Presiding Judge

/s/ Smith
Judge

In all deference to the views of my colleagues, I am forced to disagree with their conclusion. With most of their opinion I am in complete agreement. I agree that Section 602.7 Penal Code is constitutional; that the facility with which we are concerned is not the entire campus but rather the administration building; that the defendant is not of the class exempted from the statute; that there is evidence of a warning not to enter the building and that defendant heard it; that there is evidence that defendant was an active leader of some five hundred persons in activities which were designed to and had actually interfered with the peaceful conduct of the legitimate purposes of the school facility; and, finally, I agree that no special ritual is imposed on the school authority warning the accused to leave.

But I do believe that an essential element of the crime is a direction "to leave such campus or facility."

The defendant was charged in two counts. In Count I, the charge was a violation of Penal Code 602 sub(j) prohibiting entry on land for the purpose of interfering with any lawful

occupation thereon. The defendant was acquitted of this charge. Thus, the trial court found that defendant did not enter on any land for the purpose of interfering with any lawful occupation thereon.

She was convicted of a violation of Penal Code 602.7. There is ample evidence to sustain a finding of violating each element except failing to leave the facility after being directed to leave.

From the Settled Statement, I abstract the following recital bearing on this question:

> " . . . Dr. Wallace took a position in front of the West entrance of the Administration Building and, with the aid of the bullhorn, advised the entire crowd that 'demonstrations would not be permitted inside the building, that those entering the building would be subject to arrest and campus discipline. . . .' "
>
> "Various members of the crowd began to form in a line to enter the building. . . . He stated he saw Rev. Hargett, first in line, come through the door, followed almost immediately by the defendant, that they entered 'like marbles tumbling out of a bag' (defendant testified to the contrary; namely she walked peaceably into the building) and that defendant was no more than an arm's length from

Norris when he saw Norris stretch out his arms and heard him warn the persons before him against coming into the building; . . . saw the defendant enter immediately thereafter, and following her entry placed her under arrest. . . . No one advised her not to enter as she was in the process of walking into the building. No one advised her to leave the Administration Building once she had made entry."
(Settled Statement, pp. 3-5.)

The statute clearly requires as one element of the offense an authorized direction to leave and a failure to comply. I cannot equate a warning not to enter before entry with the statutory requirement of a direction to leave, presumably after entry. If this interpretation results in increased difficulty in maintaining order on school property, the remedy is with the Legislature, not the courts.

I would reverse the judgment.

Dated January 9, 1970

/s/ Vasey
Judge

APPENDIX "B"

APPENDIX "B-1"

§602. Trespasses constituting misdemeanors; enumeration

Every person who willfully commits any trespass by either:

. . .

(j) Purpose to Injure.

(j) Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession; or

. . .

APPENDIX "B-2"

§602.7 Refusal to leave state college or university property; misdemeanor

(a) In any case in which a person who is not a student or officer or employee of a state college or state university, and who is not required by his employment to be on the campus or any other facility owned, operated or controlled by the governing board of any such state college or state university, enters such campus or facility, and it reasonably appears to the chief administrative officer of such campus or facility or to an officer or employee designated by him to maintain order on such campus or facility that such person is committing any act likely to interfere with the peaceful conduct of the activities of such campus or facility or has entered such campus or facility for the purpose of committing any such act, the chief administrative officer or officer or employee designated by him to maintain order on such campus or facility may direct such person to leave such campus or facility, and if such person fails to do so, he is guilty of a misdemeanor.

(b) As used in this section:

(1) "State university" means the University of California, and includes any affiliated institution thereof and any campus or facility owned, operated or controlled by the Regents of the University of California.

(2) "State college" means any California state college administered by the Trustees of the California State Colleges.

(3) "Chief administrative officer" means the president of a state college or the officer designated by the Regents of the University of California or pursuant to authority granted by the Regents of the University of California to administer and be the officer in charge of a campus or other facility owned, operated or controlled by the Regents of the University of California. (Added Stats. 1965, c. 475, p. 1778, § 1, urgency, effective June 1, 1965.)